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IN THE

Supreme Court of the United States

October Term, 1974

No. 74/264

BANCO DO BRASIL,

Petitioner,

vs.

VENORE TRANSPORTATION COMPANY and OSWEGO SHIPPING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR RESPONDENT OSWEGO SHIPPING CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (App. A of Petition) is reported at 363 F. Supp. 1366. The opinion of the United States Court of Appeals for the Second Circuit (App. B of Petition) is reported at 498 F. 2d 469.

QUESTION PRESENTED

Whether the time charterer of a vessel (respondent), who is liable to the shipowner for damage to the vessel by

reason of breach of warranty of a safe berth may recover full indemnity from the voyage or subcharterer (petitioner) under a similar warranty of safe berth, where the assignee of the voyage charterer (receiver of the cargo) designated and provided the unsafe berth?

STATEMENT

The voyage in question was for the carriage of a full cargo of grain from a U. S. Gulf port to Salvador and other Brazilian ports in the SS SANTORE. The ship was at the general disposal of respondent Oswego Shipping Corporation (hereinafter "Oswego") under the usual New York Produce Exchange form of time charter. It was subchartered to petitioner Banco Do Brasil (hereinafter "Banco") for a voyage. Under the voyage charter a safe berth was to be provided by Banco. Banco assigned the bill of lading to two flour mills as consignees (hereinafter "Receivers"). Banco expressly admits that it is responsible for the actions of the Receivers. The Receivers required delivery at their mill which was immediately adjacent to the quay berth known as the Coal Wharf. The Receivers designated the Coal Wharf as the place of discharge. There was insufficient depth of water immediately alongside the berth for large vessels such as the SANTORE. Large vessels were accommodated by being breasted off by pontoon(s) which were furnished by the harbor authority which owned the wharf. Application for the use of this berth was made through a local firm of ships' agents, Cory Brothers. There is no evidence as to who requested Cory Brothers to file the application. Presumably the Receivers made the request. The voyage charter provided that the ship should be consigned to "Charterer's Agents". The application form filed with the harbor au-

thorities had provision for the ordering of pontoons and other services, but these particulars were left blank. In addition to its general business, Cory Brothers acted as agent for Oswego and also for the Shipowner. It acted for Oswego as agent in the matter of Oswego's obligations under the charter parties. These consisted principally in the husbanding of the ship. Although Oswego was responsible to the Shipowner for the safety of the berth, the actual furnishing of the berth as between Oswego and Banco was the responsibility of Banco, an obligation which it performed through the Receivers. The berth was unsafe for a vessel such as the SANTORE without the use of two pontoons. After lying at anchor awaiting the departure of another vessel the SANTORE was docked with the use of only one pontoon. Damage resulted during that night when the pontoon collapsed in sudden heavy weather and the ship struck the dock.

Oswego sent a cargo expediter, Captain Long, to Salvador. Captain Long arrived several days before the docking and *after* the designation and requisition had been made for the berth. He had and exercised no power of control or direction over either ship or Receivers' operations or over Cory Brothers, except to make suggestions with regard to cargo and husbanding operations. He saw that there were two pontoons in use by the prior vessel occupying the berth and assumed that the same two pontoons would be available to the SANTORE. When the SANTORE approached the berth to dock there was only one pontoon and the pilot upon making inquiry was advised that the other pontoon had been damaged by the prior vessel in leaving the berth and had been removed for repairs and would be returned in a few hours. The ship's master decided that the ship be docked forthwith and this was done with the use of only one pontoon.

Oswego has been held liable to Shipowner for the damage to the vessel and in turn entitled to full indemnity from Banco.

ARGUMENT

There is no issue as to unsafe berth or of Oswego's liability to Shipowner. The sole issue is whether there should be a division of liability between Oswego and its subcharterer upon whom the ultimate responsibility for safety of berth was placed by the contract between them. Oswego has been held liable to the Shipowner and Banco in turn has been held liable to Oswego, not as tortfeasors, but rather for breach of contractual obligations, the successive and independent warranties of safe berth. Breach of Time Charterer's warranty to Shipowner does not preclude full recovery of indemnity under the warranty of the subcharterer to Time Charterer, *Paragon Oil Co.* v. *Republic Tankers, S.A.*, 310 F. 2d 169 (2d Cir., 1962); *cert. denied*, 372 U. S. 967 (1963). The thrust of Banco's submission is that it may lessen the amount of damages for which it is responsible by showing negligence on the part of the person wronged (Oswego) in failing to take steps to lessen probable damages.

POINT I.

THE DECISION BELOW IS CLEARLY CORRECT.

The District Court made no finding of negligence on the part of Oswego. The Court of Appeals specifically found Oswego was not negligent. Petitioner's present sole contention is that Cory Brothers acted negligently in requisitioning the berth and that this was done on behalf of Oswego. There is nothing to indicate that Cory Brothers

assumed the responsibility of providing a safe berth. No negligence can be attributed to failure to specifically order two pontoons at the time the berth application was filed, for two were in use by the prior vessel. All concerned justifiably assumed two would be available for the SANTORE. The lack of one pontoon was due to an unexpected and unforeseen event immediately prior to the docking. There was no causal connection between the application for berth space and the casualty. The Receivers, the ship's master and Captain Long were all present at the actual docking and of course knew what the situation was. There is nothing to show that Cory Brothers knew or should have known at that time of the unexpected damage to one pontoon and its subsequent non-availability. Neither the ship's master nor Captain Long had any communication with any shore representatives after the docking until they both went ashore at the close of the business day. Even if "arguably" there be found some indication of negligence it is clear that there was no conduct such as to hamper, hinder, impede or prevent performance by the warrantor. *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Italia Societa Per Azioni* v. *Arigon Stevedoring Co.*, 376 U. S. 315 (1964); *Waterman Steamship Corp.* v. *David*, 353 F. 2d 660 (5 Cir., 1965). The Court of Appeals found that the Receivers were fully aware of the conditions at the Coal Wharf, that two pontoons would be necessary for safety, that they anticipated two would be provided and nevertheless permitted the docking of the ship and the unloading of its cargo to proceed although fully aware that two pontoons had not, in fact, been provided. There was no causal relationship of any act of Cory Brothers. The ultimate, sole responsibility was that of Banco.

POINT II.

THERE IS NO CONFLICT OF DECISION.

Petitioner urges that the decision of the Court of Appeals in this case is in conflict with the principles of *Cooper Stevedoring Company, Inc.* v. *Fritz Kopke, Inc.*, —— U. S. ——; 40 L. Ed. 2d 694, 700; 94 S. Ct. (May 28, 1974) and *The Standard Oil Co.* v. *Anderson*, 212 U. S. 215 (1909). There is no conflict. Petitioner does not contend that the ruling below is in direct conflict with *Cooper Stevedoring Company* but rather contends that it is in conflict with the underlying principle that one of two mutual wrongdoers should not be forced to bear the entire loss. The present case is not a case of joint tortfeasors, but rather is one of successive and independent contractual obligations, one subordinate to the other. There is no principle of equity which forbids one party who is under duty to perform an act from making a valid contract with another party to perform that duty for him. Indeed the requirements of equity were fully satisfied by the intimation of the Court of Appeals that intervening causal negligence, particularly that which would be "sufficient to preclude recovery", would dictate a different result. There was, furthermore, no misapplication of the "borrowed servant" doctrine. *Denton* v. *Yazoo & Mississippi Valley Railroad Co.*, 284 U. S. 305 (1932); *Park S.S. Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804 (2d Cir. 1951). These cases, as well as *The Standard Oil Co., supra,* make clear that the ultimate criterion of whether a servant has been borrowed is whether the work which he was doing at a particular time was the work of one party or the other. That is the standard that was applied by the Court of Appeals. The holding below that the work of Cory Brothers with respect to providing a safe berth was the work of Banco and that Banco is responsible therefor was correct.

POINT III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

There is in this case only a matter of factual determination and the application of established principles of law relating to warranty of a safe berth and the fellow servant rule.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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30 September 1974